

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: May 31, 2007

TO : Gerald Kobell, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: District 1199P, SEIU 530-6050-4133-3700
(Charles Morris Nursing and 554-1467-0150
Rehabilitation Center)
Case 6-CB-11407

This case was submitted for advice as to whether the Union violated Section 8(b)(3) by failing to honor an agreed-upon grievance settlement. We conclude that the charge should be dismissed, absent withdrawal, because the Union's apparent failure to abide by the terms of a single grievance settlement agreement neither threatens the viability of the parties' bargaining relationship or obstructs the overall functioning of the grievance resolution process.

The Region has concluded that the Respondent SEIU District 1199P and Charging Party Charles Morris Nursing and Rehabilitation Center agreed to a settlement of a contractual grievance concerning the discharge of a unit employee for theft. According to the Region, the evidence establishes that the grievant and his Union agents accepted an Employer representative's offer of reinstatement without backpay. Nonetheless, based on the grievant's insistence, the Union subsequently refused to sign off on the settlement and withdraw the grievance. Instead, the Union maintained that it had never agreed to waive backpay; rather, it insists that various Union witnesses to the negotiations maintain that the parties had agreed on backpay. The Union has referred the grievance to the American Arbitration Association for selection of an arbitrator, as the contract allows. In light of the disputed settlement, the Employer has demanded that the AAA remove the grievance from its list of active cases; it further insisted that the AAA is not authorized to select an arbitrator.

We conclude that the Region should dismiss this Section 8(b)(3) charge, absent withdrawal, because there is no evidence that the Union's apparent failure to abide by the terms of a grievance settlement in a single instance either threatens the viability of the parties' bargaining

relationship or obstructs the overall functioning of the process of grievance resolution.

Board litigation is not automatically required when a party to a collective bargaining agreement fails to abide by a contractual dispute resolution mechanism. Such disputes often arise when a party, usually an employer, refuses to bring a grievance or class of grievances to arbitration. In these circumstances, it is well settled that a refusal to arbitrate a particular grievance or class of grievances will not constitute an unlawful failure to bargain, even though it may constitute a breach of contract.¹ Only where the refusal threatens the viability of the parties' collective-bargaining relationship or "obstruct[s] the overall functioning of the process of grievance resolution" will the Board find a statutory violation.² For example, in Airport Aviation Services,³ the Board dismissed the allegation that the employer unlawfully refused to process grievances involving the dismissal of probationary employees because that issue was also the subject of a pending unfair labor practice proceeding. The Board noted that the employer continued to recognize and bargain with the union and deal with a large volume of other grievances raising issues not before the Board. Accordingly, the employer's conduct neither threatened the parties' bargaining relationship or the functioning of the grievance procedure. By contrast, in Martin Marietta Energy Systems,⁴ the Board held that the employer violated Section 8(a)(5) where it refused to process approximately 1000 grievances involving working conditions of former strikers. The Board noted that the range of issues being grieved was broad (encompassing numerous unilateral modifications of the former strikers' working condition) and that the number of strike-related grievances was large. Under these circumstances, the Board held that the employer's conduct

¹ See, e.g., Cherry Hill Textiles, 309 NLRB 268, 268 (1992), enfd. 7 F.3d 221 (2d Cir. 1993); Indiana & Michigan Electric Co., 284 NLRB 53, 54 (1987); Paramount Potato Chip Co., 252 NLRB 794, 796-97 (1980).

² Ibid. Cf. McDaniel Ford, 322 NLRB 956, 965 (1997) (employer's unreasonable rejection of all arbitrators proposed by union, in context of numerous other violations, violative of 8(a)(5); more than a lawful difference of opinion over selection of an arbitrator, employer's conduct demonstrated an intent to impede the arbitration process).

³ 292 NLRB 823, 830 (1989).

⁴ 316 NLRB 868, 868-69 (1995).

"threaten[ed] the viability of the basic bargaining relationship," which constituted an 'obstruction of the overall functioning of the process of grievance resolution.'"⁵

We conclude that the Union's apparent failure to abide by a single grievance settlement is not an unlawful failure to bargain because it does not constitute a renunciation of collective-bargaining principles. The Union is neither refusing to abide by grievance settlements in large number or on a wide variety of issues. Rather, the Union specifically posits a sequence of events during settlement discussions that differs from that proposed by the Employer. Although the Region has concluded that the Employer has the better argument, the Union's factual assertions, if credited, would be sufficient to justify its conduct in demanding arbitration under the contract. While the Union's conduct may constitute a contract breach, under these limited circumstances, we conclude that the Union's apparent failure to honor its bargain with the Employer threatens neither the viability of the contractual dispute resolution procedure nor the parties' relationship in general. Accordingly, the Region should dismiss this Section 8(b)(3) charge, absent withdrawal.

B.J.K.

⁵ Id. at 869, quoting Airport Aviation Services, 292 NLRB at 830. See similarly Paramount Potato Chip, 252 NLRB at 797 (employer's refusal to arbitrate any grievance was so "clear and flagrant" a breach of contract that it amounted to a repudiation or modification of the contractual arbitration provision itself).